NG KIM HOONG & ANOR v. PENTADBIR TANAH WILAYAH PERSEKUTUAN

HIGH COURT MALAYA, KUALA LUMPUR
DARRYL GOON SIEW CHYE JC
[LAND ACQUISITION REFERENCE NO: S-15NCVC-1-01-2012]
11 OCTOBER 2018

CIVIL PROCEDURE: *Judgments and orders – Taxation order – Bill of costs – Solicitors represented deceased in respect of acquisition of lands – Whether Deputy Registrar failed to take into account the deceased's agreement to pay fee of 2.5% on additional compensation for acquisitions – Whether agreement upon which solicitors' bill of costs was premised not agreement within s. 116 of Legal Profession Act 1976 – Whether agreement could be referred to for purposes of O. 59 r. 17(3) of Rules of Court 2012 when taxing solicitor's bill of costs – Whether costs incurred with implied or express approval of client – Whether conclusively presumed to have been reasonably incurred*

This was an appeal against the decision of the Deputy Registrar in awarding costs of RM120,095.60 to the appellant solicitors ('appellants') together with interest thereon at the rate of 5% from the date of the award, after taxing the appellant solicitors' bill of costs. The appellants, the party to be taxed, were the solicitors instructed by the deceased in respect of three separate acquisition of lands belonging to the deceased. Three separate land references were filed by the appellants. The solicitors' bill of costs was in relation to the representation of the deceased in respect of the third land reference. Having successfully represented the deceased, the appellants presented their bill of costs for their fees and disbursements. It was the appellants' belief that their bill was for a sum agreed upon by the deceased. However, the deceased had passed away and his estate was represented by his sons, the applicants ('the respondents'), the taxing parties in this appeal. It was the respondents who petitioned the court for an order that the appellants deliver a bill of costs to be taxed by the Deputy Registrar of the High Court. The appellants resisted the petition, contending that there was indeed an agreement in respect of their fees. The Deputy Registrar allowed the respondents' petition on 24 January 2014. On appeal, the High Court overturned the decision of the Deputy Registrar. The matter went further to the Court of Appeal. On 30 June 2015, the Court of Appeal held that the agreement upon which the appellants' bill of costs was premised was not an agreement within the provisions of s. 116 of the Legal Profession Act 1976 ('LPA') because the agreement was not in writing. Thus, the order of the Deputy Registrar was reinstated. Following this, the appellants drew up their bill of costs for this third land reference. This bill of costs was taxed by the Senior Assistant Registrar and on 15 September 2015, a taxed sum of RM181,850.60 was awarded. The appellants and the respondents both appealed. At the High Court, the appellants' appeal was dismissed while the respondents' appeal was allowed. As a result, the taxed sum was reduced to RM80,000. The

appellants appealed against these decisions. The Court of Appeal allowed the appellants' appeal. The appellants' bill of costs thereafter returned to the court below to be taxed. This time, the appellants' bill of costs was taxed by the Deputy Registrar and costs of RM120,095.60 was awarded. Dissatisfied, the appellants appealed again. The appellants maintained that the Deputy Registrar did not properly consider O. 59 r. 17 of the Rules of Court 2012 ('ROC') and did not follow the order of the Court of Appeal given on 25 January 2018. In relation to O. 59 r. 17 of the ROC, the crux of the appellants' contention was that the Deputy Registrar did not take into account the deceased's agreement to pay a fee of 2.5% on the additional compensation for the second and third acquisitions. The appellants maintained that the deceased's agreement should be taken into account when taxing their bill of costs. The respondents, on the other hand, contended that to take into account the deceased's agreement would be to go against the order of the first Court of Appeal of 30 June 2015.

Held (allowing appeal):

(1) Reference to what the deceased had agreed to pay the appellants and taking it into account for the purposes of O. 59 r. 17(3) of the ROC was not the same as giving effect to it as an agreement under s. 116 of the LPA. This court did not think it was a circumvention of s. 116 of the LPA. Section 116 of the LPA and O. 59 r. 17(3) of the ROC operate upon very different premises. If the agreement was valid and binding under s. 116 of the LPA, it would bind both parties without more. Since the agreement had not been held not to be a valid agreement under s. 116 of the LPA, it could not bind the parties. (para 17)

(1)(a) However, there was no reason why the agreement could not nevertheless be referred to for the purposes of O. 59 r. 17(3) of the ROC when taxing a solicitor's bill of costs. Rule 17(3) exists and is sufficiently clear on the need to have regard to any implied or express approval given for costs that are incurred and the amount incurred. It was the fact that the client had agreed, that was the operative factor in r. 17(3), and not the existence of a binding agreement. Section 116 of the LPA, on the other hand, was concerned with the existence of a binding agreement between a solicitor and his client in respect of costs, entered into in the manner prescribed. While s. 116 of the LPA sets out the manner in which binding agreements for costs are to be entered into, that did not *per se* preclude costs that were agreed to by the client, and thus approved, from being taken into account for the purposes of O. 59 r. 17(3) of the ROC 2012. (para 17)

(2) The law desired not to allow a client, who has approved his solicitors' costs, to gainsay and disavow the approval and to seek to have the solicitors' costs taxed without any regard to the prior approval given. It was not inconceivable that after a period of time, and with the

litigation behind them, litigants may be tempted to renege on prior agreements or approvals given. It was neither unjust nor unfair that prior approvals given freely, be taken into account. Besides, the requirement of an agreement in writing under s. 116 of the LPA was not a condition to be found in O. 59 r. 17 of the ROC. To ignore the agreement by the deceased would be to ignore O. 59 r. 17(3) of the ROC altogether. As such, in accordance with the order of the Court of Appeal on 25 January 2018, the court may have regard to the deceased's agreement with the appellants, on their costs, for the purposes of O. 59 r. 17 of the ROC, without offending the decision of the Court of Appeal on 30 June 2015. (para 18)

(3) Order 59 r. 17(2) of the ROC makes it clear that both the amount of costs incurred and the reason for incurring them are subject to an overriding requirement that they must not be unreasonable. Under O. 59 r. 17(3) of the ROC, if the costs incurred were with the implied or express approval of the client, it was conclusively presumed to have been reasonably incurred and the amount incurred was to be regarded to have been reasonable. The costs agreed to by the client, the deceased, based on the calculations given, was RM501,667.10. Having regard to O. 59 r. 17(3) of the ROC, this sum was to be regarded as a reasonable sum. In any event, having regard to O. 59 r. 17(2) of the ROC, this amount was not unreasonable in light of the over RM20 million that was awarded in the land reference. (paras 21 & 22)

Case(s) referred to:
Trendtex Trading Corporation And Another v. Credit Suisse [1918] 3 All ER 520 ***(refd)***

Legislation referred to:
Legal Profession Act 1976, s. 116
Rules of Court 2012, O. 59 rr. 1, 16(1), 17(1), (2), (3), 24
Rules of the High Court 1980, O. 59 r. 28

For the appellants - Amee Liew & Au Yong; M/s YH Teh & Quek
For the respondents - Ahmad Ezmeel & Vincent Lim; M/s Dennis Nik & Wong

Reported by Suhainah Wahiduddin

JUDGMENT
(encl. 26)

Darryl Goon Siew Chye JC:

[1] This is an appeal against the decision of the learned Deputy Registrar in awarding costs of RM120,095.60 to the appellant solicitors together with interest thereon at the rate of 5% from the date of the award, after taxing the appellant solicitors' bill costs.

[2] The appellants, the party to be taxed, were the solicitors instructed by one Ng Kee Wei (deceased). The appellants were instructed in respect of three separate acquisitions of lands belonging to the deceased. Three separate land references were filed by the appellants. The solicitors' bill of costs in question in this case relates to their representation of the deceased in respect of what, as a matter of convenience, may be referred to as the third land reference.

[3] Having successfully represented the deceased, the appellants presented their bill of costs for their fees and disbursements. It was the appellants' belief that their bill was for a sum agreed upon by the deceased. However, by then, the deceased had passed away and his estate was represented by his sons, the applicants cited in the intitulement. It is the applicants who are the taxing parties and respondents in this appeal. To avoid any confusion, for the purposes of this appeal, the applicants shall hereinafter be referred to as the respondents. The deceased passed away on 25 July 2012. It was the respondents, in their capacity as legal representatives of the estate of the deceased, who petitioned the court for an order that the appellants deliver a bill of costs to be taxed by the Deputy Registrar of the High Court.

[4] The appellants resisted the petition, contending that there was indeed an agreement in respect of their fees. The learned Deputy Registrar allowed the respondents' petition on 24 January 2014. On appeal, the High Court overturned the decision of the learned Deputy Registrar. The matter went further to the Court of Appeal. On 30 June 2015, the Court of Appeal held that the agreement upon which the appellants' bill of costs was premised was not an agreement within the provisions of s. 116 of the Legal Profession Act 1976. According to learned counsel, this was because the agreement was not in writing as is the requirement under s. 116. Section 116 provides as follows:

> Advocate and solicitor may enter agreement for costing contentious business
>
> 116. (1) Subject to any written law, an advocate and solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of his costs in respect of contentious business done or to be done by such advocate and solicitor, either by a gross sum, or otherwise, and either that the same rate or at a greater or lesser rate than the rate at which he would otherwise be entitled to be remunerated.
>
> (2) Every such agreement shall be signed by the client and shall be subject to this Part.

Thus the order of the learned Deputy Registrar was reinstated.

[5] Following the decision of the Court of Appeal of 30 June 2015, the appellants drew up their bill of costs for this third land reference. This bill of costs was taxed by the learned Senior Assistant Registrar and on

14 September 2015, a taxed sum of RM181,850.60 was awarded. The appellants appealed. The respondents also appealed. At the High Court, the appellants' appeal was dismissed while the respondents' appeal was allowed. As a result, the taxed sum of RM181,850.60 was reduced to RM80,000. The appellants appealed against both these decisions. The Court of Appeal allowed both the appellants' appeal and significantly, for the purposes of this decision, the Court of Appeal's order of 25 January 2018 stated *inter alia* that:

> 1. Persoalan undang-undang sama ada Aturan 59 Kaedah 17 Kaedah-Kaedah Mahkamah 2012 adalah terpakai dalam pentaksiran Bil Kos Perayu dijawab secara affirmative;
>
> ...
>
> 4. Bil Kos Perayu ditaksirkan semula oleh Timbalan Pendaftar yang berlainan dengan mengambilkira peruntukan Aturan 59 Kaedah 17 Kaedah-Kaedah Mahkamah 2012;

[6] The appellants' bill of costs thereafter returned to the court below to be taxed. This time the appellants' bill of costs was taxed by the learned Deputy Registrar and costs of RM120,095.60 was awarded together with interest of 5% from the date of the award. The appellants' bill of costs was for an amount of RM1,101,925.60.

[7] The appellants' being dissatisfied, appealed again. In this appeal, the appellants maintained that the learned Deputy Registrar did not properly consider O. 59 r. 17 of the Rules of Court 2012 and did not follow the order of the Court of Appeal given on 25 January 2018.

[8] In relation to O. 59 r. 17, the crux of the appellants' contention is that the learned Deputy Registrar did not take into account the deceased's agreement to pay a fee of 2.5% on the additional compensation for the second and third acquisitions. Evidence of this agreement was set out in the appellants' affidavit in reply of 20 August 2013.

[9] On 23 May 2012, the second respondent had sent an email stating *inter alia*:

> 3. Have agreed with Aimee on a 2.5% nett fee/cost based on additional compensation for the 2nd & 3rd acquisitions.

Of some significance is the fact that this was before the passing of the deceased, *albeit* not long before that.

[10] On the 23 October 2012, the second respondent sent an email to the first respondent stating:

> John,
>
> Dad has agreed on 2.5% of the award

When, on the same day, the first respondent enquired if the second respondent had any recollection when this was agreed to and whether it was in writing, the second respondent replied:

> John,
>
> It was agreed upon after the 3rd acquisition hearing was concluded. While it is not in writing, the verbal agreement of Dad has to be honoured ...

It may also be pertinent to point out that the decision of the Court of Appeal of 30 June 2015, in holding that the agreement between the appellants and the deceased did not come within s. 116 of the Legal Profession Act 1976, implied in itself that there was such an agreement, save that it was not in writing as is the requirement under s. 116.

[11] The relevant paragraphs of O. 59 r. 17 of the Rules of Court 2012 state as follows:

> Costs payable to a solicitor by his own client (O. 59 r. 17)
>
> 17. (1) This Rule is in amplification and not in derogation of the procedure set out in the Legal Profession Act 1976.
>
> (2) On the determination of a solicitor's bill to his own client (except a bill with respect to non-contentious business and a bill payable pursuant s. 5 of the Legal Aid Act 1971), all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred.
>
> (3) For the purpose of paragraph (1), all costs incurred with the express or implied approval of the client shall be conclusively presumed to have been reasonably incurred and, where the amount thereof has been expressly or impliedly approved by the client, to have been reasonable in amount.

For the purposes of O. 59, O. 59 r. 1 defines "costs" as including fees, charges, disbursements, expenses and remuneration.

[12] It needs to be pointed out that the reference to "para. (1)" in O. 59 r. 17(3) is somewhat perplexing. It would be less perplexing and more logical if "para. (1)" is read as "para. (2)". However, as learned counsel for the appellant pointed out, it ceases to be perplexing if one were to have regard to the former iteration of this rule which is to be found in O. 59 r. 28 of the Rules of the High Court 1980, the relevant parts of which state as follows:

> 28. (1) On the taxation of a solicitor's bill to his own client (except a bill with respect to non-contentious business) all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred.
>
> (2) For the purpose of paragraph (1), all costs incurred with the express or implied approval of the client shall, subject to paragraph (3), be conclusively presumed to have been reasonably incurred and, where the amount thereof has been expressly or impliedly approved by the client, to have been reasonable in amount.

(3) For the purpose of paragraph (1), any costs which in the circumstances of the case are of an unusual nature and such that they would not be allowed on a taxation of costs in a case to which rule 27(2) applies, shall, unless the solicitor expressly informed his client before they were incurred that they might be so allowed, be presumed, until the contrary is shown, to have been unreasonably incurred.

Therefore, it would appear that when amending this rule to its present form, there was insufficient attention paid to which paragraph O. 59 r. 17(3) ought to refer to. In relation to O. 59 r. 17(1), it may also be pointed out that it cannot be read to refer to s. 116 of the Legal Profession Act 1976 because, if s. 116 applies, there will be no need for a taxation under O. 59 r. 17. What r. 17(1) states is merely that it does not derogate from the "procedure" set out under the Legal Profession Act 1976.

[13] Having regard to the Court of Appeal's order of 25 January 2018 and O. 59 r. 17(3), the appellants maintain that the deceased's agreement should be taken into account when taxing their bill of costs. The amount of costs based on the deceased's agreement was costs that were incurred with or had the implied or express approval of their client, the deceased. The 2.5% agreed works out to RM501,677.10. Having regard also to the fact that the compensation the estate of the deceased received was RM20,067,084.14, the appellants contended that the sum of RM501,677.10 was not an unreasonable sum. In fact, the appellants contended that this sum is the very least that should be awarded. As they were no longer bound by the agreement with the deceased under the provisions of s. 116 of the Legal Profession Act 1976, the appellants maintained that they are entitled to a total sum of RM1,101,925.60 after taking into account both O. 59 r. 17 and the factors set out under O. 59 r. 16. Order 59 r. 16(1) sets out certain specific circumstances that need be taken into account when assessing costs:

Basis of assessment (O. 59, r. 16)

16. (1) In assessing the costs payable in relation to any item, the Court shall have regard to all relevant circumstances, and in particular to:

(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel;

(c) the number and importance of the documents, however brief, prepared or perused;

(d) the place and circumstances in which the business involved is transacted;

(e) the importance of the cause or matter to the client;

(f) where money or property is involved, its amount or value;

A (g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

B **[14]** The respondents on the other hand, contended that to take into account the deceased's agreement would be to go against the order of the first Court of Appeal of 30 June 2015. Quite apart from the fact that the agreement is not enforceable as such under s. 116 of the Legal Profession Act 1976, learned counsel for the respondents also contended that the agreement was C champertous, citing the decision of the English House of Lords in *Trendtex Trading Corporation And Another v. Credit Suisse* [1918] 3 All ER 520. On top of that, they maintained that the fee agreed to by the deceased was due to a misrepresentation by the appellants.

[15] In so far as the alleged misrepresentation is concerned, it was an D allegation that was made by the second respondent in his letter to the appellants of 10 July 2013. This was about a year after the deceased's demise. This alleged misrepresentation was based on a paragraph in the appellants' letter of 25 June 2012 to the deceased, almost a year earlier. It was alleged that in this letter of 25 June 2012, the appellants had E misrepresented that in respect of the land acquisitions, the deceased was not entitled to any interests due to the provisions of the Limitation Act 1953. This was said to be wrong and that the deceased had been induced into agreeing to pay the said 2.5% as the appellants' costs by reason of this misrepresentation.

F **[16]** I am however not persuaded by the alleged misrepresentation. It is an allegation by the second respondent that his father was misled. There is nothing from the deceased to this effect. In addition, this alleged misrepresentation was not mentioned until almost a year after the deceased's demise and after the emails referred to above.

G **[17]** Reference to what the deceased had agreed to pay the appellants and taking it into account for the purposes of O. 59 r. 17(3) is not the same as giving effect to it as an agreement under s. 116 of the Legal Profession Act 1976. While this may appear to be, however, I do not think it is in fact a circumvention of s. 116 of the Legal Profession Act 1976. Section 116 of the H Legal Profession Act 1976 and O. 59 r. 17(3) operate upon very different premises. If the agreement was valid and binding under s. 116 it would bind both parties without more. Since the agreement has been held not to be a valid agreement under s. 116, it cannot bind the parties. However, there is no reason why the agreement cannot nevertheless be referred to for the I purposes of O. 59 r. 17(3) when taxing a solicitor's bill of costs. Rule 17(3) exists and is sufficiently clear on the need to have regard to any implied or express approval given for costs that are incurred and the amount incurred.

It is the fact that the client had agreed, that is the operative factor in r. 17(3) and not the existence of a binding agreement. Section 116 of the Legal Profession Act 1976 on the other hand, is concerned with the existence of a binding agreement between a solicitor and his client in respect of costs, entered into in the manner prescribed. While s. 116 sets out the manner in which binding agreements for costs are to be entered into, that does not *per se* preclude costs that are agreed to by the client, and thus approved, from being taken into account for the purposes of O. 59 r. 17(3) of the Rules of Court 2012.

[18] It would seem to me that the law desires not to allow a client, who has approved his solicitor's costs, to gainsay and disavow the approval and to seek to have the solicitor's costs taxed without any regard to the prior approval given. It is not inconceivable that after a period of time, and with the litigation behind them, litigants may be tempted to renege on prior agreements or approvals given. In my view, it is neither unjust nor unfair that prior approvals given freely, be taken into account. Besides, the requirement of an agreement in writing under s. 116 of the Legal Profession Act 1976 is not a condition to be found in O. 59 r. 17. To ignore the agreement by the deceased would be to ignore O. 59 r. 17(3) altogether. As such, I hold that in accordance with the order of the Court of Appeal of 25 January 2018, the court may have regard to the deceased's agreement with the appellants, on their costs, for the purposes of O. 59 r. 17, without offending the decision of the Court of Appeal of 30 June 2015.

[19] The appellants have presented a bill of costs for a total sum of RM1,101,925.60. There is however merit in the argument by learned counsel for the respondents that there would be overlapping work on the part of the appellants in relation to the land references. In fact, in the appellants' letter of 25 June 2012 to the deceased, it is stated in para. 8 thereof:

> 8. Further to that, due to the peculiarity of there being three separate acquisitions on the same plots of land, we took your instructions to try and have all three acquisitions heard consecutively, **so that all the facts and issues that arise in the three acquisitions need not be repeated** and would be dealt with speedily.
>
> (emphasis added)

[20] While under O. 59 r. 16, the court is to have regard in particular to the amount or value of the money or property in question, I am of the view that the amount sought of RM1,101,925.60 is too much for the land reference. There is no evidence to suggest that there were particularly difficult or novel points of law involved, although the Land Acquisition Act 1960 was amended and the appellants had to address the amendments. While there were reports prepared by engineers and valuers and the appellants would have had to acquaint themselves with these reports, the reports were

nevertheless not prepared by the appellants. It was contended by the appellants that the whole process took a long time. However, that does not *per se* mean it involved more legal work or more complex legal work.

[21] Order 59 r. 17(2) of the Rules of Court 2012 makes it clear that both the amount of costs incurred and the reason for incurring them are subject to an overriding requirement that they must not be unreasonable. Under O. 59 r. 17(3), if the costs incurred were with the implied or express approval of the client, it is conclusively presumed to have been reasonably incurred and the amount incurred is to be regarded to have been reasonable.

[22] The costs agreed to by the client, the deceased, based on the calculations given, was RM501,677.10. Having regard to O. 59 r. 17(3), this sum is to be regarded as a reasonable sum. In any event, having regard to O. 59 r. 17(2), this amount is not unreasonable in light of the over RM20 million that was awarded in the land reference.

[23] Was the sum of RM501,677.10 unreasonably incurred? There was no contention by the respondents that this sum, or any part of it, was unreasonably incurred. Are the appellants entitled to the difference between this sum of RM501,677.10 and the total of RM1,101,925.60 sought? I think not. There is nothing to warrant a larger sum to be awarded to the appellants. Even after taking into account the circumstances set out under O. 59 r. 16, I would still conclude that the sum of RM501,677.10 is a reasonable sum to award the appellants having regard to the circumstances of this case and, in particular, to the deceased's prior agreement.

[24] As for the issue of interest, O. 59 r. 24 states that:

> Any award of costs made under this Order shall carry such interest as may be specified under Order 42 rule 2, from the date of award of costs until full payment.

[25] Therefore, I allow the appeal and I award the appellants, the party being taxed, the sum of RM501,677.10 as costs with interest thereon at the rate of 5% per annum from the date hereof until the date of full payment.